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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 29

FOREST BRITT PETER, *Petitioner*

vs.

UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Petitioner

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 88-96) is reported at 324 F.2d 173. The United States District Court for the Northern District of California, Southern Division, in entering its judgment of conviction from which appeal was taken to the court below (R. 4), did not issue an opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on October 30, 1963 (R. 96). A petition for rehearing was denied on December 10, 1963 (R. 97). The petition for writ of certiorari was filed on January 24, 1964, and was granted on May 4, 1964, (R. 99).

STATUTE INVOLVED

The pertinent provisions of the United States Constitution and the Universal Military Training and Service Act, hereafter called the Act (62 Stat. 604, *et seq.* (1948), 50 U.S.C. App. 451, *et seq.* (1958)), are set forth in the Appendix, *infra*.

QUESTIONS PRESENTED

1. Whether the exemption from military service for persons conscientiously opposed to service in the armed services, under Section 6(j) of the Universal Military Training and Service Act, requires belief in Deity.

2. Whether, if the answer to the first question presented is in the affirmative, Section 6(j) is unconstitutional under the First and Fifth Amendments to the United States Constitution.[1]

STATEMENT

A. Proceedings Before Petitioner's Local Draft Board and the Appeal Board

Petitioner registered with his Local Draft Board in Hayward, California, on July 10, 1956 (R. 13). Subsequently, petitioner completed and filed the standard classification form (R. 14-20). Although he did not claim exemption as a conscientious objector in this form, petitioner submitted with the completed form an excerpt from a poem opposing war, and expressed his concurrence with the thoughts it expressed (R. 23). Thereafter, on March 4, 1958, petitioner

1. A third question was presented in the Petition, relating to the exhaustion of administrative remedies by Petitioner. In its responsive memorandum, however, the Government states that it "does not intend to argue in this case that petitioner failed to exhaust his administrative remedies." (Memo, p. 9), and for that reason the question is not discussed in this brief.

requested his Local Board to furnish him a form to apply for classification as a conscientious objector, which he completed and returned to the Board on March 8, 1958 (R. 24, 25-29). Petitioner responded to the question on the form which inquired as to his belief in a Supreme Being by stating, "It depends on the definition," and referring to an attached page, where he wrote (R. 27):

> Since the human life is for me a final value, I consider it a violation of moral law to take human life. I think I have reached this conviction out of my reading of such writings as those of Blake (christian mystic), Emerson, Whitman, and more modern poets who have touched on the question.
>
> I consider this belief to be superior to my obligation to the state.
>
> Insofar as this conviction is religious, it has been best described by Rev. John Haynes Holmes as follows: "Religion is the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands . . . [It] is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best."

The attached sheet also stated, in response to questions as to the sources of his belief and the circumstances under which he believed in the use of force (R. 27):

> I would say that the source of my conviction concerning the sacredness of human life and the human spirit has been my experience and study in our democratic American culture, with its values derived from the western religious and philosophical tradition. As I have indicated above, I feel that I have learned of the values of this tradition through personal reading and meditation rather than through experience in any organized groups.

> The use of violence (physical force) comprises the ends one seeks in action. I consider war to be the greatest example of this. The use of non-violence in the freeing of India and the Montgomery bus strike is an example of the kind of force I do believe in.

The Local Draft Board rejected petitioner's application, and classified him as 1-A. Thereafter, petitioner requested a hearing before the Local Board "through which I may state my beliefs and present new evidence and information," which request was granted (R. 30, 31). In connection with the hearing, petitioner submitted the following written statement respecting his belief as to God (R. 33):

> "I have this God inside of me. To be truthful, I don't know if it's a long or short God or even a Superior God (much less a Supreme Being) and I have no idea what its sex is. I'm even worried about calling it God. After all a great deal of death has been done in the name of God.
>
> This God I have inside of me goes off every once in a while and opens me to the motions, to beauty and sadness in the universe. That is, now and again I feel the compulsion to meet the world around me. I'm filled with wonder, I'm possessed as it were, I feel so good I think I'm crazy. So my God isn't beyond me, it's within me and opens me to Godliness in the world."

The record contains only a brief summary of the proceedings at the hearing, prepared by the clerk of the Local Draft Board, stating that petitioner appeared with a supporting witness "to help him in explaining his case" (R. 34).

Following the hearing, the Local Board reaffirmed its determination that petitioner should be classified as 1-A, but on August 13, 1959, forwarded his file to the Selective Service Appeal Board upon petitioner's expression of dis-

satisfaction with the ruling (R. 34). In accordance with Section 6(j) of the Act, an investigation was made by the Department of Justice in connection with the appeal, and a hearing was conducted on February 29, 1960, before a hearing officer. In the course of the investigation, statements on petitioner's behalf were submitted by acquaintances, and petitioner also submitted a further statement explaining the nature and sources of his beliefs respecting war (R. 45-54). The Department of Justice reported to the Appeal Board that the hearing officer had been told by petitioner that "he had no orthodox religious background," and that he did not pray (R. 36, 37). The hearing officer, insofar as the report shows, did not question the sincerity of petitioner's beliefs, but concluded that petitioner "evidenced neither religious training and belief nor belief in a Supreme Being as defined in the Military Training and Service Act" (R. 37). The Department of Justice recommended that petitioner's "claim be not sustained by [the Appeal] Board" (R. 38).

On July 29, 1960, the Appeal Board furnished petitioner with a copy of the recommendation of the Department of Justice, and notified petitioner that he would be afforded opportunity to make a written reply thereto (R. 54-55). In response petitioner submitted a lengthy letter stating, *inter alia* (R. 57-61):

> I have never directly answered 'yes' or 'no' to your question "Do you believe in a Supreme Being" because I do not know what you mean by the phrase . . . However, I'm moved by many of the elements in the world-in creation.
>
> You might say I believe in them. I believe in these elements because they are there . . . We say, that a tree is beautiful. But why? Because the tree moves us. The branches, the leaves, the very form of the tree,

> the forces it exemplifies. I do not choose to name this tree God as if that would explain its reason or essence. This is a very distinctive tree and deserves a new name and a reverence that is open to the endless number of things the tree tells us—of form, life and death, of ourselves, our own existence.
>
> I don't think this is lack of belief. I'm upheld by creation, finding ease as well as pain there . . . I believe in elements of this creation like star or animal motion. And I'd work toward an understanding with them called living relationship or form of love.
>
> This is the conscious effort of my life and I have already suffered some regarding it . . .

On November 18, 1960, the Appeal Board determined that petitioner's classification of 1-A should remain in effect. Thereafter, petitioner was ordered to report for a pre-induction physical examination on August 30, 1961 (R. 63). Petitioner wrote the Local Board that he would not appear for the examination because of his beliefs, and the examination was not given at the appointed time (R. 62).

Thereafter, petitioner was ordered to report for induction into military service on November 22, 1961 (R. 65). The order showed that petitioner was classified as a delinquent in view of his failure to submit to the pre-induction physical examination *(ibid.)*. Petitioner presented himself at the induction station as directed, but refused to be processed for induction (R. 8). Petitioner's Record of Induction form shows, in an attached Report of Medical Examination, that some entries were made respecting medical data of petitioner, and that the original date for examination—August 30, 1961—was crossed out and the date of November 22, 1961, substituted in its place (R. 73). In addition, there is stamped over the form's notation "PIP", presumably referring to pre-induction physical, the

word "INDUCTEE" *(ibid.)*. Apart from the foregoing, the record does not show to what extent, if any, a physical examination was given to petitioner at the time scheduled for his induction.

In January, 1962, petitioner's file was referred to the office of the United States Attorney in San Francisco (R. 75-76). In June of the same year petitioner wrote identical letters to his Local Draft Board and to the California State Headquarters for Selective Service requesting permission to be given a physical examination (R. 77, 79). The letters explained that the request was made on advice of counsel, to the end that petitioner "might better present my objection to war and opposition to the military institution at future hearings of my case" *(ibid.)*. A similar request was made in a letter to the Director of Selective Service, General Hershey, dated July 6, 1962 (R. 81). To this letter was attached an additional letter from petitioner to General Hershey dealing with petitioner's beliefs respecting his objections to military service, which in many respects is repetitious of earlier statements. In part, the statement reads as follows (R. 82-87):

> I have never answered "yes" or "no" to the question "Do you believe in a Supreme Being?", for several reasons. For one, I was not sure of the Government's definition of a Supreme Being and, as far as I know, the government has never defined the words "Supreme Being" in print or in any law . . . The nature of my belief is more complex and I must have more room to expand my thoughts and to express, or translate, my beliefs through the medium of language. I find this task additionally difficult because I place the stress of my belief on the products, the elements in creation, rather than on a reverence toward the possible Creator of these elements and mysteries of the universe.

This reverence for the elements in the universe before that of the possible creator might be unorthodox, but it is not foreign to religious thought. Witness the writings of Buddha (those attributed to him and early followers), and of Lao Tzu as well as Christian Mystics like Boehme and Blake.

• • • • • • •

I feel that one is not amiss in terming my conviction "religious" in that it is based on vision and a dedication to that vision, and I feel that this vision and my commitment to it fits into a definite tradition if not into any specific historical group.

• • • • • • •

I'm motivated by what Albert Schweitzer calls a "reverence for life," I think of myself as a receptive organ through which the tragedy and beauty of the world are perceived.

• • • • • • •

The presence of other living beings in the universe sounds a call, presents a vision, a fact, a mysterious reality that I cannot deny and to which I feel the impulse to relate.

I view physical violence on the other hand as a denial of life.

• • • • • • •

My conviction is not based on intellectual conclusions alone, but is primarily based on the promptings of my heart and the sense of relationship with all living elements in nature."

Petitioner's requests for a physical examination were denied both by the Local Board and the California State Headquarters (R. 78, 80).

B. Proceedings Before the District Court

On September 26, 1962, petitioner was indicted under Section 12(a) of the Act on the ground that he "did, on the

22nd day of November, 1961 . . . knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States . . . (R. 1-2)". Petitioner was tried on November 16, 1963, without jury, the evidence consisting principally of his selective service file. Petitioner testified briefly at his trial with respect to his claim for conscientious objector's status as follows (R. 9):

> I think the basic reason—my religious basis for my conscientious objection to war is a reference to all living things. I feel a relationship to all other living beings, and I feel called upon to respect them, and I could not kill them or engage in an institution such as the Armed Forces, which predicates this belief, which would lead one possibly in the service to commit such an act to kill.

Petitioner repeated his earlier statements that he was unable to make an unqualified answer to the question of whether he believed in a Supreme Being, and explained (R. 10-11):

> I have also said that I couldn't possibly give the answer in just a yes or no question, because I think I have some right to define God or my religious beliefs in my own words.
>
> • • • • • • •
>
> I think that my actions are probably motivated most thoroughly by a feeling of relationship and love towards other human beings and other living objects in the world, and in seeing these other living objects. I can narrow it down closer; I can define it as a belief in the mystery of the heart of the essence being alive, and my respecting and loving this livingness in other objects and human beings.
>
> • • • • • • •
>
> I suppose you could call that a belief in the Supreme Being or God. These just do not happen to be the words I use.

Finally, in answer to a question on cross-examination as to his understanding of the term "religion," petitioner stated *(ibid.)*:

> By "religion"—I think in my own terms, religion is based on two things. Number one would be vision, a vision of reality in the world or the universe, and second is conviction regarding that vision, the way a person reacts to his vision of reality.

At the close of the trial, the district court forthwith found petitioner guilty as charged in the indictment (R. 11). Judgment was rendered on November 30, 1962, sentencing petitioner to six months imprisonment (R. 4-5).

C. The Decision of the Court Below

The court below affirmed the conviction. Its decision (R. 88-96) is premised upon the assumption that petitioner "was absolutely sincere" in the beliefs which motivated his opposition to induction, but rests on the conclusion that petitioner did not hold a belief "in relation to a Supreme Being" (R. 93). The court below explained that it had ruled in earlier decisions that the religious exemption under the Universal Military Training and Service Act required acceptance by the registrant of "the concept of deity" (R. 95, quoting from *Berman v. United States*, 156 F.2d 377, 381, certiorari denied, 329 U.S. 795). The statutory term "Supreme Being," according to the court below, connotes a belief in God, and in view of petitioner's failure to profess a belief in God the court ruled that he did not qualify for the exemption. Beliefs in opposition to service in the armed service not grounded on acceptance of Deity, according to the court, must at best be ascribed to "political, sociological, or philosophical views or a merely personal moral code" which the statute excludes as bases for a religious exemption.

SUMMARY OF ARGUMENT

This case, together with Nos. 50 and 51 on the Court's docket, present the common question of whether Section 6(j) of the Act is unconstitutional in that it discriminates among the kinds of religious beliefs which qualify a registrant for exemption from military service. The constitutional question need not be reached in the present case or in No. 51, however, if it is determined that the views of the respective registrants satisfy the statutory requirement for exemption of "belief in a relation to a Supreme Being."

I. Petitioner's beliefs, although not orthodox, accept the existence of a universal power beyond that of man. It may be conceded that petitioner does not identfy this power as God, but his belief in a supernatural authority is demonstrated by his expressions of faith in "some power manifest in nature which helps man in the ordering of his life in harmony with its demands," his reliance on teachings of Christian mystics, and his acceptance of concepts which transcend the power and will of mortal man.

Belief in the existence of a superhuman and universal power constitutes belief in a "Supreme Being" within the meaning of Section 6(j) of the Act. The court below erred in reading "Supreme Being" to be the equivalent of God within the meaning given to the concept of Deity by established religious systems. The present wording of Section 6(j) of the Act was adapted from language in the opinion in *Berman v. United States* 156 F.2d 377 (C.A. 9), certiorari denied, 329 U.S. 795, which utilized the word "God." Congress' substitution of the term "Supreme Being" was intended to broaden the exemption to beliefs which accept the existence of a superhuman power in the universe, irrespective of whether that power might fit into established concepts of Deity. In reading Section 6(j) of the Act to

extend the religious exemption to petitioner, moreover, a serious constitutional question is avoided.

II. Section 6(j) of the Act is in any event unconstitutional. This Court has made clear that religious freedom as protected by the First Amendment to the Constitution extends to religious beliefs which do not accept the existence of Deity or any authority beyond that of man as well as those which do. Orthodoxy in religious creed has never been a criterion for constitutional protection. It is enough that the subject matter of the belief is religious in character.

Section 6(j) of the Act, however, expressly distinguishes between religious beliefs which accept the existence of a Supreme Being and those which do not. This is an unconstitutional classification. The Constitution requires uniform treatment by the state of all religious thought, and tolerates no preference for one or another kind of belief. In view of the unconstitutionality of the statutory provision on the basis of which petitioner was denied an exempt status, his conviction must be set aside.

ARGUMENT

Introduction—The relation of this case to Cases Nos. 50 and 51. This is one of three cases before the Court this term which present related questions involving the meaning and constitutionality of the statutory language granting exemption from military service for conscientious objectors. Consideration of this case must accordingly take into account the issues and rulings below in the other cases.

United States v. Jakobson, No. 51 on the Court's docket, presents initially a question of the applicability of Section 6(j) of the Act to a set of personally conceived and unorthodox views in opposition to military service. The Court of Appeals for the Second Circuit described the registrant's beliefs as follows (325 F.2d 409, 412-413):

> "He recognizes an ultimate cause or creator of all existence which he terms 'Godness.' In theory an individual's relationship to Godness can take one or the other of two forms, a 'vertical' relationship in which man relates directly to Godness, or a 'horizontal' one in which man relates to Godness indirectly by binding himself to the qualities of Godness that exist in every creation in Mankind and throughout the world. For himself, Jakobson rejects the vertical 'one-to-one' relationship because God is unknowable to man, and because action and spiritual growth purportedly based on a direct relationship with Godness must thus lead to error since man can reason but imperfectly about the unfathomable . . . The way to arrive closer to Godness is by approaching the universals inherent in existence. The individual must deal directly with life, death, health, love, time—the 'givens' of existence stemming from the Ultimate Cause—as he finds them in himself and others.
>
> . . . . . .
>
> The taking of human life is incompatible with acceptance, which sees in all humanity 'Godness—the quality of having been created by the Ultimate Cause. Jakobson adopts the position of acceptance."

Jakobson's Draft Board and Appeal Board concluded that his claim was based "upon a personal moral code" (325 F.2d at 411, which Section 6(j) excludes from the qualifying requirement of a belief "in relation to a Supreme Being involving duties superior to those arising from any human relation." The Second Circuit rejected this conclusion. Reading Section 6(j) "as broadly as the words permit" (325 F.2d at 415) in deference to its doubts as to the constitutionality of the Supreme Being test if narrowly applied, the Court held that Jakobson's beliefs qualified him for the religious exemption. Although not attempting a precise definition of the scope of the statutory exemption, the Court concluded

that the language was not so restricted as to require a belief in "an anthropomorphic deity." 325 F.2d at 415.

United States v. Seeger, No. 50 on this Court's docket, was decided by the Court of Appeals for the Second Circuit subsequent to its decision in the *Jakobson* case. In *Seeger*, the registrant's beliefs did not accept the existence of a supernatural power, and thus did not satisfy the Supreme Being test as defined in *Jakobson*. As the Court summarized Seeger's views (326 F.2d 846, 848):

> ". . . rejecting dependence upon his Creator for a guide to morality, Seeger asserted 'more respect for . . . belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.' . . . In language which underscored the ethical foundation of his faith, he decreed "the tremendous spiritual price that man pays for his willingness to resort to the mass destruction of human life to perpetrate his 'ideals.'"

The Second Circuit, relying on its earlier decision in *United States v. Kauten*, 133 F.2d 703, noted that religious belief, to which the language in Section 6(j) was directed, "could not be confined to a belief in a supernatural power; that today, a pervading commitment to a moral ideal is for many the equivalent of what was historically considered the response to divine commands." 326 F.2d at 853. Accordingly, the Court was faced with the constitutional question of whether Section 6(j) could validly distinguish between religious views based on the dictates of a Supreme Being, and those which do not accept the concept of a Supreme Being. The Court answered the question in the negative. The decision relies on this Court's opinion in *Torcaso v. Watkins*, 367 U.S. 488, which makes clear that the protection afforded the exercise of religious freedom in the First

Amendment is applicable to religious thought which rejects as well as that which accepts the existence of God.

For purposes of analysis under Section 6(j) of the Act, petitioner's views in the present case, as described *supra*, would appear to lie closer to those of Jakobson than to those of Seeger. As in the *Jakobson* case, petitioner's opposition to service in the armed services is grounded upon "some power manifest in nature" (R. 27) rather than simply upon a "devotion to goodness and virtue for their own sakes." *Seeger*, 326 F.2d at 848. As we have shown, however, the court below was of the opinion that petitioner's beliefs did not measure up to an acceptance of Deity, and reasoned that it necessarily followed that petitioner's views were based on " 'a merely personal moral code' " (R. 95). In this respect, the court below reads the exemption language of Section 6(j) more narrowly than does the Second Circuit.

It is evident from the foregoing that the present case and *Jakobson* differ fundamentally from the *Seeger* case with respect to the nature of the beliefs involved. Both the mysticism which characterizes petitioner's faith and the "transcendence" (325 F.2d at 416) by which Jakobson sought to know "Godness" assume the existence of forces external to man. The core of Seeger's belief, on the other hand, was "internally derived," and assumed no power beyond that of mortal man. 326 F.2d at 853. Thus, the central question in the *Seeger* case is whether Congress may constitutionally limit the conscientious objector's exemption to persons who base their opposition to military service on the dictates of a Supreme Being. A subsidiary question is whether Seeger's objections to military service were religious in nature, and thus within a class to which, it may be assumed, Congress might validly restrict the exemption. The constitutional question, however, need not be determinative in either

Jakobson or the instant case if, as held by the Second Circuit, Section 6(j) is read to encompass religious views of the nature held by the registrants in these two cases because they are based on the existence of forces external to man. In turn, it may be noted that affirmance of the Second Circuit's ruling in *Seeger* would also invalidate Section 6(j) on constitutional grounds for purposes of the instant case and *Jakobson*, in which event there would be no need to pass on the question of statutory interpretation.

In the light of the foregoing, we turn to a discussion of the questions of the statutory and constitutional questions which the instant presents.

I. Petitioner's Beliefs, as Presented in Support of His Claim for Classification as a Conscientious Objector, Satisfy the Requirements for Exemption Under Section 6(j) of the Act

A. The Ground for Petitioner's Opposition to Military Service Is a Belief in an Authority Beyond the Power of Man Which Forbids Such Service

A description of petitioner's religious views, like those of the registrant in *Jakobson*, "is not altogether easy." 325 F.2d at 412. In neither case do the beliefs fit into an orthodox theological system; in each the beliefs have been personally conceived and developed by the registrant. Petitioner answered the inquiry on the conscientious objector's questionnaire as to the origin of his beliefs by explaining that "the source of my conviction concerning the sacredness of human life and the human spirit has been my experience and study in our democratic American culture, with its values derived from the western religious and philosophical tradition" (R. 27). It is not questioned by the court below that a religious faith acquired through individual study and thought may properly support an objection to military service which qualifies the registrant under Section 6(j) of the Act.

The court below, rather, rested its decision on its conclusion that petitioner did not "manifest clearly and unequivocally a belief in a Supreme Being to whom he owed obedience" (R. 95). It may be conceded that petitioner did not profess a belief in a Deity, at least in the ordinary sense that conventional religious groups understand the concept of God. As we show below, however, and contrary to the conclusion of the Court of Appeals, a faith in God is not an indispensable qualification for the religious exemption under Section 6(j) of the Act. It is enough to qualify under this provision that a registrant demonstrate a sincere belief in the existence of forces beyond the power of man, though not worshiped as God, which dictate his refusal to serve in the armed services. The record shows that petitioner has satisfied this requirement.

Thus, in the explanation of his beliefs petitioner stated in the conscientious objector's questionnaire that his views were best described in a quotation from Reverend John Haynes Holmes to the effect that "Religion is the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands" (R. 27). In the same questionnaire, petitioner also referred to his "conviction concerning the sacredness of human life and the human spirit . . ." (*ibid.*). In further statements submitted in support of his application for exemption, petitioner wrote that he was "motivated by what Albert Schweitzer calls a 'reverence for life,'" and that he thought of himself "as a receptive organ through which the tragedy and beauty of the world are perceived" (R. 83). Petitioner testified during his trial that he conceived of religion as "a vision of reality in the world or universe," and a "conviction regarding that vision" (R. 11). This concept, according to petitioner, compelled "a belief in the mystery of the

heart of the essence of being alive, and . . . respecting and loving this livingness in other objects and human beings" (R. 10).

There is a marked similarity between the views before the Second Circuit in *Jakobson* and those of petitioner in that both emphasize the relationship of the individual with other persons and living objects as the touchstone to religious experience. The registrant in *Jakobson* explained to his draft board that "man relates to Godness indirectly by binding himself to the qualities of Godness that exist in every creation in Mankind and throughout the world." 325 F.2d 412. Petitioner, in like vein, stated in support of his exemption claim (R. 83, 85):

> ". . . I place the stress of my belief on the products, the elements in creation, rather than on a reverence toward the possible Creator of these elements and mysteries of the universe . . . My conviction is . . . primarily based on the promptings of my heart and the sense of relationship with all living elements in nature."

Just as the registrant in *Jakobson* reasoned that "God is unknowable to man" (325 F.2d at 413), petitioner refers, in explaining his beliefs, to the "mysteries of the universe," the "mystery of the heart of the essence of being alive," "some power manifest in nature" and to the teachings of Christian mystics (R. 83, 10, 27). Unable to define the nature of this supernatural power, both turn to life about them rather than to "a reverence toward the possible Creator" (R. 83) for meaningful religious experience. In each case, however, it is plain that the registrants do not predicate their opposition to military service solely upon an ethical rule of proper political and moral behavior, but rather upon adherence to principles which derive from a power in the universe—acknowledged although unknowable—that super-

sedes both the authority and understanding of man. This simple, yet profound act of ultimate faith characterizes even the most orthodox of religious systems.

The Court of Appeals for the Second Circuit concluded that recognition of the existence of such a power constitutes a "belief in a relation to a Supreme Being" within the meaning of Section 6(j) of the Act. The court below reached the opposite conclusion, holding that petitioner's beliefs were consistent only with "a merely personal moral code" (R. 95). We show below that the Second Circuit's reading of Section 6(j) is correct.

B. The Supreme Being Requirement of Section 6(j) of the Act Is Satisfied by a Religious Belief Which Acknowledges the Existence of an Authority Beyond the Power of Man

The history of the exemption from military service for conscientious objectors is traced by the Second Circuit in its opinion in *Jakobson*, and need not be repeated in detail here. The present language of Section 6(j) was adopted in 1948, and reference was made in the Senate Report accompanying the proposed amendment in the 1940 Act to the decision in *Berman v. United States*, 156 F.2d 377 (C.A. 9), certiorari denied, 329 U.S. 795, by way of explanation of the language changes.[1] In construing the scope of the religious exemption in the 1940 Universal Military Training and Service Act, the *Berman* opinion, as noted, *supra*, had adopted a statement of Chief Justice Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605, 633-634, that

1. Senate Report, 1268, 80th Cong., 2d Sess. p. 14 (1948), states: "(j) Conscientious objectors:—This section reenacts substantially the same provisions as were found in sub-section 5(g) of the 1940 Act. Exemption extends to anyone who, because of religious training and belief in his relationship to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service. (See *Berman v. United States*, 156 F.2d 377, certiorari denied, 329 U.S. 795)."

religion connoted a "belief in a relation to God involving duties superior to those arising from any human relations." This reading of the 1940 Act has generally been considered to be at variance with that of the Court of Appeals in the Second Circuit, which interpreted the religious exemption in the Act to encompass opposition to military service based on "a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse." *United States v. Kauten*, 133 F.2d 703, 708 (C.A. 2). See also, *United States ex rel Phillips v. Downer*, 135 F.2d 521 (C.A. 2); *United States ex rel Reel v. Badt*, 141 F.2d 845 (C.A. 2).

From the foregoing, there is little doubt that Congress, in amending Section 6(j) of the Act in 1948, meant to follow the direction which the *Berman* opinion pointed with respect to the quality of the religious belief which is prerequisite to exemption from military service. The doubt raised by the *Kauten* opinion, and those which followed it, as to whether belief in an authority higher than man was required by Section 6(j) of the Act, was resolved against the interpretation given by the Second Circuit. Refusal to perform military service in response to ethical convictions alone may accordingly be assumed to be insufficient to qualify under the 1948 amendment. The further question of whether Section 6(j) was intended by Congress to require a belief in Deity as such—the interpretation to which the court below is committed—is now before the Court in the present case and in *Jakobson*. If it may be fairly said that the *Berman* opinion intended to answer this question affirmatively, we nonetheless do not believe it follows, because of the reference to that opinion in the 1948 Senate Report, that the 1948 amendment should be read to go as far as *Berman*.

The necessary starting point for an inquiry into the scope of the present wording of Section 6(j) is an appreciation of the serious constitutional difficulties which arise, as we show below, if it is concluded that the exemption of Section 6(j) does not apply to petitioner and to the registrant in *Jakobson*. In accordance with the established rule, every effort should be made to construe the statutory language "in the candid service of avoiding a serious constitutional doubt." *United States v. Rumley*, 345 U.S. 42, 47. Following this approach, the Second Circuit has read Section 6(j) "as broadly as the words permit," and has concluded that the views of the registrant in *Jakobson*, satisfy *the Supreme Being* test. 325 F.2d at 415. As the Second Circuit pointed out, however, its reading of the statute does not unduly strain the ordinary meaning of the statutory words. Indeed, eminent theologians have expressed opinions relating to the nature of God that "seem quite close to Jakobson's beliefs." 325 F.2d at 416, n. 5.

Although the derivation of the 1948 amendment to Section 6(j) may be traced to the *Berman* decision, the critical statutory phrase "belief in a relation to a Supreme Being" is not the exact equivalent of "belief in a relation to God," the phrase found in the *Berman* opinion. "Supreme Being" is a generic term which connotes the general principle of an authority higher than man without inviting the definitional difficulties inherent in the term "God." Religious sects are scarcely uniform in their teaching as to the characteristics of Deity. A belief which is approved by a particular creed as an acceptance of God may well be regarded by another as a rejection of God. The traditional basis for extending statutory grace to conscientious objectors, however, lies in a recognition of sincerely held religious convictions, without specification of the substantive content of such convictions, or their authorization by any particular sect.

In these circumstances, the declination of Congress to adopt the term "God," which is found in the *Berman* opinion, and the substitution of the phrase "Supreme Being," reflects an intent to avoid particularization of the religious views which will support an exemption classification, and to require only that the conscientious objector demonstrate a belief in a power beyond that of man which compels a refusal to serve in the armed forces. The draft board which must evaluate an answer to the question "Do you believe in God?" must define God, before it can classify the registrant. This inevitably plunges it into dealing with religious imponderables and passing "on nice theological distinctions" (*Jakobson*, 325 F.2d at 416) which Congress could not have assumed to be within the competence of the lay members who perform this public service. Difficulties of this character are minimized if the standard for exemption is the sincere acceptance by a registrant of a universal power beyond those evident in this world, whether or not this power is God within the meaning of established clerical thought.

Had Congress intended in 1948 to adopt the requirement of a belief in God, which the court below reads into the *Berman* opinion, it could well have used the term "God" in the language of the amendment, which otherwise tracks the phraseology which appears in that opinion. In view of the difficulties, as described above, which this course would have created, the deliberate substitution of the phrase "Supreme Being," is persuasive of a Congressional intent to simplify the task of administering the religious exemption by requiring only a belief in the existence of universal forces beyond the power of man, without identifying such forces as God. Congress indicated no desire to complicate the administration of the exemption provisions of the

Act. Indeed, the Senate Report accompanying the 1948 amendment states that the language of the amendment "reenacts substantially the same provisions as were found in sub-section 5(g) of the 1940 Act." S.Rep. 1268, 80th Cong., 2d Sess., p. 14 (1948). The exemption in 1940 Act extended to any person, "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 54 Stat. 889. The variegated beliefs which are encompassed within the field of religion, particularly within the protection of the First Amendment of the Constitution (see pp. 25-26, *infra.*), are circumscribed for more narrowly by a definition which presupposes the existence of God than by a definition which requires, without particularization, an acceptance of an authority higher than that of man. The latter concept more closely parallels the general words of the 1940 Act, which Congress in 1948 stated that it meant to reenact without substantial change.

These considerations compel the conclusion that beliefs of the kind professed by petitioner and the registrant in *Jakobson* are within the scope of the present exempting language of Section 6(j) of the Act. If they are unorthodox, that circumstance scarcely disqualifies them as religious beliefs in a society which has historically been committed to the protection of individual opinions and faiths which do not conform to established concepts. The Supreme Being test requires not orthodoxy, but only acceptance of a universal power, however the registrant may conceive of it, which is beyond that of man.

II. Section 6(j) of the Act Is in Any Event Unconstitutional

The considerations which demonstrate the unconstitutionality of Section 6(j) of the Act are set forth in Judge Kaufman's opinion in *United States v. Seeger*, 326 F.2d 846

(C.A. 2), No. 50 on this Court's docket. We subscribe to the views of the Second Circuit in the *Seeger* case, which are fully stated in the opinion and need not be repeated here. We add only the following observations.

There is no question in the present case as to whether Congress might decline altogether to exempt registrants on the ground of a conscientious objection to service in the armed forces. It may be assumed that the religious exemption is a matter of legislative grace. It does not follow, however, that an exemption, once granted, may be made available only on unconstitutional conditions. Indeed, the contrary is established law. *Speiser v. Randall*, 357 U.S. 513; *Fowler v. Rhode Island*, 345 U.S. 67; *Torcaso v. Watkins*, 367 U.S. 488.

There is also no occasion to consider whether a valid distinction may be drawn in the enactment of the exemption provisions in the Act between religious and non-religious objections to military service. Even if it may be assumed that the limitation of the exemption in the Act to religious beliefs is within the province of Congress, again it does not follow that preference may be made among religious beliefs in defining qualifications for exemption. In the cases presently before the Court, the constitutional question arises because Section 6(j) explicitly confines the scope of the exemption to those who profess a belief in a Supreme Being. If this statutory qualification could be regarded as coterminous with religious belief generally, there would be no basis for finding that Section 6(j) of the Act discriminates in the treatment of varying religious beliefs. In the light of this Court's decisions, however, the foregoing hypothesis cannot be supported. There is no escape from the conclusion that an acceptance of the existence of a Supreme Being is not prerequisite to religious beliefs which are constitutionally protected.

The most direct statement on the subject is in *Torcaso v. Watkins*, 367 U.S. 488, where the Court found unconstitutional a state requirement which conditioned the grant of a notary commission upon a declaration of a belief in God. In ruling that the condition was contrary to the equality of treatment among religions which is required by the First and Fourteenth Amendments, the Court stated that (367 U.S. at 495):

> ". . . neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."

In a footnote to the foregoing language, the Court added (*id*, at n. 11):

> "Among the religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others. See *Washington Ethical Society v. District of Columbia*, 249 F.2d 127; *Fellowship of Humanity v. County of Alameda*, 153 C.A. 2d 673, 315 P.2d 394; II Encyclopaedia of the Social Sciences 293; 4 Encyclopaedia Britannica (1957 ed.) 325-327; 21 id., at 797; Archer, Faiths Men Live By (2d ed. revised by Purinton), 120-138, 254-313; 1961 World Almanac 695, 712; Year Book of American Churches for 1961, at 29, 47."

The foregoing statement is controlling in the present case whether or not the statutory phrase "Supreme Being" is considered to be the equivalent of "God." See pp. 19-23, *supra*. Just as acceptance of the existence of God is not

essential to a constitutionally protected religious belief, neither is the acceptance of the existence of a universal power higher than man which the believer does not perceive as God. As observed by this Court in *United States v. Ballard*, 322 U.S. 78, 86:

> [Freedom of religious belief] embraces the right to maintain theories of life and death and of the hereafter which are rank hereby to followers of orthodox faiths . . . Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others.

It has never been questioned that the role of the First Amendment in matters of religion has been to protect religious beliefs of all kinds, irrespective of whether they are consistent with established doctrine concerning Deity or a Supreme Being. See *Sherbert v. Verner*, 374 U.S. 398. As summarized by the Second Circuit in the *Seeger* opinion, "belief in a Supreme Being, no matter how broadly defined, cannot embrace all those faiths which can validly claim to be called 'religious' ". 326 F.2d at 852.

In light of the foregoing, it also is not open to question that petitioner's views by which he sought to establish his exemption from military service are "religious" within the meaning and protection of the First Amendment to the Constitution. For purposes of invoking constitutional protection, it matters not whether petitioner's beliefs include acceptance of a universal power higher than that of man. But see pp. 16-18 *supra*. Petitioner's reasons for declining military service relate to his views concerning the dictates of "some power manifest in nature" (R. 27), "the sacred-

ness of human life and the human spirit" (R. 27), to his "vision of reality in the world or universe" and his "conviction regarding that vision," (R. 10), and to his "relationship with all living elements in nature" (R. 85). Petitioner considered that his faith in respect to these matters imposed duties "superior to [his] obligation to the state" (R. 27). Convictions of this character deal with religion as the term is commonly understood, whether they assert or deny a belief in superhuman power. Petitioner's faith, although perhaps not compatible with any recognized creed, has the same promptings and deals with the same subject matter as the most orthodox of faiths. As expressed by the Second Circuit in *United States v. Kauten*, 133 F.2d 703, 708, religious impulse and thought "arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe . . . It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets." It is not the popularity or the logic of beliefs that qualify them for constitutional protection. Rather, it is the subject matter of the beliefs, and there is no occasion in the present case to delineate the outer reaches of the field of religion in order to determine that the subject matter of petitioner's beliefs is religious in nature.

The breadth of religious protection afforded by the Constitution does not necessarily preclude the distinction, which Congress has attempted to make in Section 6(j) of the Act, between "religious training and belief" and "essentially political, sociological, or philosophical views or a merely personal moral code." The latter classification, to the extent that it attempts to exclude from the exemption purely secular beliefs, stands or falls constitutionally upon the

same considerations which allow or disallow an exemption in favor of religious objectors without extending the same exemption to conscientious objectors who assert only non-religious grounds for their position. The latter question is not presented in the instant case. If it may be assumed that Congress may extend the privilege of exemption only to those who profess religious grounds, however, it may not be assumed that the presence in the makeup of religious beliefs of considerations pertaining to morality, philosophy, sociology or politics could disqualify a registrant for exemption. Stated otherwise, religion within the meaning of the First Amendment of the Constitution is not a concept which can be wholly divorced from considerations of morals, ethics, or other disciplines which also relate to secular thought. These elements are likely to be present in all religious systems. It is accordingly not enough to remove petitioner from the protection of the Constitution to detect in his explanations for his refusal to perform military service the presence of philosophical, or ethical reasoning. The subject matter of petitioner's beliefs are essentially religious in character. No more need be shown to invoke constitutional protection.

From the foregoing it is plain that Section 6(j) of the Act, in limiting the religious exemption to those who establish their belief in a Supreme Being, circumscribes an area of religious belief which is more restricted than that covered by the Constitution. Congress has extended the privilege of exemption to persons who subscribe to certain kinds of religious beliefs, but not to those who subscribe to other kinds of religious beliefs.

The decisional law is clear that a distinction of this character cannot constitutionally stand. "Neither [the State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over

another." *Everson v. Board of Education*, 330 U.S. 1, 15. "The government must be neutral when it comes to competition between sects." *Zorach v. Clauson*, 343 U.S. 306, 684. "In the relationship between man and religion, the State is firmly committed to a position of neutrality." *Abington School District v. Schempp*, 374 U.S. 203, 226. "The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position." *United States v. Ballard*, 322 U.S. 78, 86. See also, *Sherbert v. Verner*, 374 U.S. 398; *Illinois ex. rel. McCollum v. Board of Education*, 333 U.S. 203; *Fowler v. Rhode Island*, 345 U.S. 67.

The decisions cited above, as fully explained by the Second Circuit in its opinion in *Seeger*, compel the conclusion that Section 6(j) of the Act violates the First Amendment of the Constitution, and also imposes an arbitrary classification forbidden by the Fifth Amendment to the Constitution. The application of the provision to petitioner was accordingly invalid, and his conviction cannot stand.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below be reversed, and the conviction set aside.

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September, 1964.

(Appendix follows)

Appendix

The relevant provisions of the Universal Military Training and Service Act, 50 U.S.C. App. 451, *et seq.*, are as follows:

Section 6(j), 50 U.S.C., App. 456(j):

> "Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board, shall, if he is inducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]. Any person claiming exemp-

tion from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant services as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescibe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]."

* * * * * * *

Section 12(a), 50 U.S.C., App. 462(a):

"(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-454 and 455-471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to

perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said sections], rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title [said sections], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections], or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said sections], or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sections], or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this [said sections] or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title [said sections] unless such

person has been actually inducted for the training and service prescribed under this title [said sections] or unless he is subject to trial by court martial under laws in force prior to the enactment of this title [June 24, 1948]. Precedence shall be given by court to the trial of cases arising under this title, and such cases shall, upon request of the Attorney General, be advanced on the docket for immediate hearing."

The relevant provisions of the Constitution of the United States are as follows:

Amendment I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

* * * * * * *

Amendment V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."